

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13840

JOHN J. RIGBY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

OLIVER GASCH,

United States Attorney.

LEWIS CARROLL,

JOEL D. BLACKWELL,

HARRY T. ALEXANDER,

Assistant United States Attorneys.

United States Court of Appeals

For the

District of Columbia Circuit

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Joseph W. Stewart

CLERK

QUESTIONS PRESENTED

1. Where on the hearing of his motion to suppress evidence acquired by an F. B. I. agent, appellant relied solely upon the affidavit of his wife and failed to support his motion by legal evidence, did appellant sustain his burden or effect standing?

2. Is appellant a victim of an illegal seizure at the hands of Metropolitan Police?

(a) Whether appellant and his wife consented to the search?

(b) Whether appellant's wife alone consented to the search?

3. In view of concurrent sentences, should this Court reverse when on his motion to suppress property acquired by an F. B. I. agent, appellant failed to assume his burden, and the evidence is sufficient to sustain Count Four?

(I)

INDEX

	Page
Counterstatement of the case.....	1
A. Commission of the Crime.....	2
B. Arrest, Acquisition of Property, Pleadings and Hearing on Motion To Suppress Evidence.....	4
Statutes and Rules Involved.....	5
Summary of Argument.....	7
Argument:	
I. Appellant failed to sustain his burden as to the alleged illegal seizure by the F. B. I. agent.....	8
II. The alleged seizure by the Metropolitan Police was lawful.....	12
(a) Appellant and his wife gave actual consent to the search of their apartment.....	13
(b) Appellant's wife alone consented to the alleged search..	14
III. Appellant was given concurrent sentences and the evidence is sufficient to sustain count four of the indictment.....	15
Conclusion.....	15

TABLE OF CASES

<i>Accardo v. United States</i> , D. C. Cir. No. 13,596, May 29, 1957.....	2, 10, 15
<i>Amos v. United States</i> , 255 U. S. 313 (1921).....	11
<i>Brainord v. United States</i> , 95 U. S. App. D. C. 121, 220 F. 2d 384 (1955).....	13, 14
<i>Cradle v. United States</i> , 85 U. S. App. D. C. 315, 178 F. 2d 962 (1949), cert. denied, 339 U. S. 929.....	13, 14
<i>Ellison v. United States</i> , 93 U. S. App. D. C. 1, 206 F. 2d 476 (1953)...	9, 13
<i>Fisher v. United States</i> , 92 U. S. App. D. C. 247, 205 F. 2d 702 (1953)...	9, 13
<i>In re Fried</i> , 161 F. 2d 453 (2d Cir. 1947), cert. denied, 331 U. S. 858.....	8, 12
<i>Gibson v. United States</i> , 80 U. S. App. D. C. 81, 149 F. 2d 381 (1945), cert. denied, 326 U. S. 724 (1945).....	13, 15
<i>Higgins v. United States</i> , 93 U. S. App. D. C. 340, 209 F. 2d 819 (1954)...	11, 13
<i>Hirabayashi v. United States</i> , 320 U. S. 81 (1943).....	15
<i>Jarabo v. United States</i> , 158 F. 2d 509 (1st Cir. 1946).....	9, 10
<i>Jennings v. United States</i> , D. C. Cir. No. 13,629, May 29, 1957....	8, 9, 13, 14
<i>Johnson v. United States</i> , 333 U. S. 10 (1948).....	11, 14
<i>Judd v. United States</i> , 89 U. S. App. D. C. 64, 190 F. 2d 649 (1951).....	11, 14
<i>Lee v. United States</i> , 98 U. S. App. D. C. 97, 232 F. 2d 354 (1956).....	11, 14
<i>Long v. Ansell</i> , 63 App. D. C. 68, 69 F. 2d 386 (1934).....	12
<i>Lotto v. United States</i> , 157 F. 2d 623 (8th Cir. 1946).....	9, 10
<i>McQuaid v. United States</i> , 91 U. S. App. D. C. 229, 198 F. 2d 987 (1952), cert. denied, 344 U. S. 929.....	12

IV

	Page
<i>Morton v. United States</i> , 79 U. S. App. D. C. 329, 147 F. 2d 28 (1945), cert. denied, 324 U. S. 875.....	12
<i>Nardone v. United States</i> , 308 U. S. 338 (1939).....	9, 11
<i>Poettler v. United States</i> , 31 F. 2d 438 (9th Cir. 1929).....	8
<i>Schutte v. United States</i> , 21 F. 2d 830 (6th Cir. 1927).....	8
<i>Stein v. United States</i> , 166 F. 2d 851 (9th Cir. 1948), cert. denied, 334 U. S. 844.....	11, 12, 15
<i>Thomas v. United States</i> , 154 F. 2d 365 (10th Cir. 1946).....	8
<i>Tillotson v. United States</i> , 97 U. S. App. D. C. 402, 231 F. 2d 736 (1956), cert. denied, 351 U. S. 989.....	9, 10, 11
<i>United States v. Haas</i> , 106 F. Supp. 295 (W. D. Pa. 1952).....	8
<i>United States v. Mitchell</i> , 322 U. S. 65 (1944).....	13
<i>United States v. Sergio</i> , 21 F. Supp. 553 (E. D. N. Y. 1937).....	12
<i>United States v. Sferas</i> , 210 F. 2d 69 (7th Cir. 1954), cert. denied, 347 U. S. 935.....	8, 12
<i>United States v. Vatune</i> , 292 Fed. 497 (N. D. Cal. 1923).....	9
<i>United States v. Waller</i> , 108 F. Supp. 450 (N. D. Ill. 1952).....	8
<i>United States v. Warrington</i> , 17 F. R. D. 25 (N. D. Cal. 1955).....	9, 10, 11
<i>Waldron v. United States</i> , 95 U. S. App. D. C. 66, 219 F. 2d 37 (1955).....	11
<i>White v. United States</i> , 194 F. 2d 215 (5th Cir. 1952), cert. denied 343 U. S. 930.....	9, 10
<i>Wilson v. United States</i> , 218 F. 2d 754 (10th Cir. 1955).....	9, 10

OTHER REFERENCES

Title 22, Section 1801—District of Columbia Code.....	1
Title 22, Section 2201—District of Columbia Code.....	1
Rule 41 (e), F. R. Cr. P.....	7, 9
U. S. Constitution, amend. 4.....	8

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On July 30, 1956, a four count indictment was filed against appellant, John J. Rigby, and a codefendant, Accardo, in the United States District Court for the District of Columbia. The first and third counts charged appellant and his co-defendant with two separate housebreakings committed on different dates at the premises of Paul R. Bauman and Allan J. Lewis, respectively, in violation of Title 22, Section 1801 of the District of Columbia Code. The second count charged appellant and his co-defendant with grand larceny of property of the Baumans and one Maude J. Davis on the date of the housebreaking in Count One, while the fourth and final count charged grand larceny of the property of Allan J. Lewis on the date of the housebreaking in Count Three, in violation of Title 22, Section 2201 of the District of Columbia Code (as amended, Supp. IV), (J. A. 1). Appellant's pre-trial motion for suppression of evidence, executed by his counsel (J. A. 2) was denied (J. A. 7, 8, 9-11). Found guilty by jury on all four

counts of the indictment¹ (J. A. 9, 11-12), appellant was sentenced to concurrent terms of one to three years (R. 13). A direct appeal was allowed by this Court (R. 14).

A. Commission of the crimes

The first housebreaking occurred on the night of June 15, 1956, during the absence of Dr. Bauman, his wife and children and their maid, Mrs. Davis, notwithstanding the premises had been securely locked. It was stipulated that the property listed in Count Two of the indictment was valued above \$100 and was stolen from the Bauman's residence at 4811 Nebraska Avenue, NW. The property was identified by Mrs. Bauman who had not given appellant or his codefendant permission to enter (R. 47-52). Maude Jane Davis identified her platinum ring, valued at \$300, which was also stolen in the housebreaking (R. 54-56).

It was stipulated that the second housebreaking occurred on June 23, 1956, at a photographic studio, 1743 Connecticut Avenue, NW. (J. A. 23). The housebreaking and larceny occurred in the absence of the proprietor, Mr. Lewis, who on trial identified a check writer, valued about \$250 or \$300, a photographic album, a check book on the "Riggs National Bank" and some loose checks that were stolen from his desk. Neither appellant nor his codefendant were known to complainant or had been given permission to enter his office (J. A. 14-16).

A Special Agent of the Federal Bureau of Investigation, Karl H. Nau, first saw Accardo on June 27, 1956, in the doorway of 1855 Calvert Street, NW. (J. A. 17), and shortly thereafter² Accardo said he was "visiting friends" at Apartment 409 of the latter address (R. 67). The agent's investigation revealed that said apartment was occupied by appellant and Mrs. Rigby (J. A. 18) and the latter conversed with and ad-

¹ The pretrial motion of Accardo, appellant's codefendant, was likewise denied. His conviction was recently affirmed on appeal. *Accardo v. United States*, D. C. Cir. No. 13,596, May 29, 1957.

² Prior to trial it was stipulated that Accardo was arrested as a fugitive from justice (R. 46).

mitted the agent following a knock on her door (R. 72). The agent identified several items, stolen from Mr. Lewis' photo shop, which he had seen and seized from the rear bedroom of the Rigby apartment (J. A. 17-18),³ as a result of a conversation with Mrs. Rigby (R. 69-70, 75).

Detective Leon L. Frost of the Metropolitan Police Department, assigned to investigate the Bauman housebreaking at 4811 Nebraska Avenue NW., saw appellant on June 28, 1956, and conversed with him about the housebreaking on two occasions, once in his apartment, 409, 1855 Calvert Street NW., and at Police Headquarters. The officer identified property stolen in the Bauman housebreaking which he had removed from the Rigby apartment with Mrs. Rigby's permission (J. A. 19-20).⁴ He also identified a ring which he had seized from Accardo's possessions, pursuant to a search warrant, while in custody of the Superintendent of the Jail (J. A. 20-22). Cross-examination revealed that the officer had located only two of the stolen items and the remainder of the numerous items, except the ring (J. A. 23), were pointed out to him by appellant and Mrs. Rigby (R. 93-94, 97). Mrs. Rigby was given a receipt (R. 97), even though the officer had no search warrant (R. 98). Accardo told the officer he procured the ring from appellant's apartment (R. 99-100).

Thereafter, appellant agreed that testimony of two additional officers would be cumulative (R. 104). Government's exhibits, constituting the proceeds of the crimes, were admitted into evidence without objection (R. 104) and the Government rested (R. 105). Appellant failed to make a motion for judgment of acquittal and rested his case without putting in any evidence (R. 112). The court, *inter alia*, instructed the jury upon (1) reasonable doubt, (2) burden of proof, (3) weight and credibility of the evidence, and (4) circumstantial evidence (R. 131-137).

³ Property found and listed in Count Four of the Indictment included a check book, checks, and a photograph album (J. A. 16-18).

⁴ Property obtained and listed in Count Two of the indictment included two sport coats, a dinner jacket and a topcoat of Dr. Bauman, also a Falcon camera (J. A. 19-20).

B. Arrest, acquisition of property, pleadings and hearing on motion to suppress evidence

Appellant's motion for suppression of evidence, filed through counsel (J. A. 2) was accompanied by an affidavit of his wife, Joann Rigby (J. A. 3-4) who, although not charged as a defendant, sought thereby to establish she permitted Special Agents of the F. B. I. to seize "the property of Accardo" on "June 26, 1956" "because they said if I didn't they would break the door down or get a search warrant." Appellant's wife also alleged that "on June 27, 1956" she opened her door and saw appellant being frisked by Metropolitan Police, who thereafter brought her husband back into the apartment and conducted a search and seizure; that one of the officers told her husband he was under arrest, and that she signed a receipt for the property because she "was distraught and in order to get rid of the police" (J. A. 4). Appellant's motion was also accompanied by his personal affidavit which claimed that on "June 25, 1956" he was "apparently arrested" in the hallway outside his apartment by members of the Metropolitan Police Department, who took him back into his apartment and conducted a search of the premises (J. A. 3).

When appellant's motion came on for a hearing, he rested on his affidavits and failed to introduce any evidence as to the acquisition of property by the F. B. I. agents on June 27, 1956, or by the Metropolitan Police on June 28, 1956, notwithstanding he had been informed of his "burden of going forward with the evidence" (R. 145). However, the Government introduced evidence at the hearing of the motion which showed that on June 28, 1956, after learning that Accardo had been arrested by F. B. I. agents on June 27, 1956, and having ascertained that stolen property allegedly in possession of Accardo had been recovered from appellant's apartment, Detectives Leon L. Frost and Xander of the Metropolitan Police Department went to appellant's apartment "on a preliminary investigation" (J. A. 36). Neither appellant nor his wife responded to a knock at their door. Being informed that someone was present therein, the officers staked-out at an adjacent apartment. About forty-five minutes later, appellant entered the hall from his apartment and when called to by the officers, turned upon

them in a menacing manner. Appellant was immediately told to raise his hands "and at that time Rigby's wife, Joann, had come to the door * * *" The officers, after telling appellant they would like to talk with him, went back into the apartment accompanied by appellant and without objections from either appellant or his wife. Mrs. Rigby was very cooperative. She recalled that on the previous day, F. B. I. agents had removed certain property and further informed the officers that there was additional property in the apartment brought there by Accardo and which was not owned by her or appellant. Mrs. Rigby voluntarily produced, without appellant's objection, "several items" stolen in the Bauman housebreaking. Before the officers left Mrs. Rigby reminded them, "You forgot these two sport coats in the closet." Appellant added that the police could also take a television set allegedly brought there by Accardo (J. A. 32-35).

After argument by appellant (R. 170-171) the trial court found that the property was voluntarily relinquished since the sworn testimony of Detective Frost, which was subject to cross-examination, had greater weight as compared with appellant's "sheer affidavits." The court also found that the officers had consummated a valid arrest in the hallway. Accordingly, appellant's motion was denied (J. A. 40).

STATUTES AND RULES INVOLVED

The United States Constitution, Amendment IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Rules of Criminal Procedure, Rule 41 (e) provides:

Motion for Return of Property and to Suppress Evidence.—A person aggrieved by an unlawful search and seizure may move the district court for the district in

which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * * The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Title 22, District of Columbia Code (1951 Edition) Section 1801, Definition and penalty, provides:

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code (1951 Edition as Amended, Supp. IV), Section 2201—*Grand Larceny* provides:

Whoever shall feloniously take and carry away anything of value of the amount or value of \$100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

SUMMARY OF ARGUMENT

The trial court properly denied appellant's motion to suppress evidence acquired by a Special Agent of the Federal Bureau of Investigation on June 27, 1956, because appellant failed "to support his motion by *competent legal evidence* produced, or adduced, in Court at the time of the hearing." The affidavit filed by appellant's wife does not constitute *evidence*, and hence is not compliance with Rule 41 (e) F. R. Cr. P. nor does it confer the required *standing*. Assuming the uncontroverted evidence adduced at trial could be retrospectively applied to appellant's pre-trial motion, it is clear that appellant's wife could, and did, consent to a seizure of property not claimed by her or appellant.

II

Appellant's judicial admission contained in his pretrial affidavit and the uncontroverted evidence adduced at the hearing of his motion conclusively show that appellant was arrested immediately after he came out of his apartment when he turned on the officers in a menacing manner. Appellant's door having been opened by his wife, it was the officers' duty to continue their investigation within the apartment. Reasonable grounds to believe that appellant and his wife had committed a felony also justifies his arrest. The hearing reflects that no search was conducted, but that the property was given to the officers by appellant and his wife. Assuming a search, it was incident to the arrest and consented to by appellant and/or his wife.

III

Since appellant failed in his burden of proof as to property acquired by the F. B. I. agent, on June 27, 1956, and the same was subsequently introduced to sustain Count Four of the Indictment without objection, this Court will not reverse in the face of concurrent sentences.

ARGUMENT

I

Appellant failed to sustain his burden as to the alleged illegal seizure by the F. B. I. agent

Appellant contends that the trial court erred in denying his pretrial motion for suppression of evidence as to the property acquired by a Special Agent of the Federal Bureau of Investigation on June 27, 1956, subsequently introduced at trial to sustain Count Four of the Indictment, as well as to property acquired by the Metropolitan Police on June 28, 1956, subsequently introduced at trial to sustain Count Two of the Indictment. Appellant's contention as to the latter date will be dealt with in Argument II.

Appellant assumes that the affidavit of his wife is sufficient to sustain his burden on the motion to suppress and apparently contends that actual consent to search cannot be given to Special Agents of the Federal Bureau of Investigation. Although appellant refers to the "*force majeure*" which allegedly necessarily accompanies F. B. I. agents, he cites no authorities for his proposition.

It is axiomatic that the constitutional protection against unreasonable searches and seizures contained in the Fourth Amendment is a personal right which may be waived by consent. *United States v. Sferas*, 210 F. 2d 69 (7th Cir. 1954), *cert. denied*, 347 U. S. 935; *Thomas v. United States*, 154 F. 2d 365 (10th Cir. 1946); *United States v. Waller*, 108 F. Supp. 450 (N. D. Ill. 1952). That the officer to whom a consent to search is given is an F. B. I. agent does not abrogate the rule. *In re Fried*, 161 F. 2d 453 (2d Cir. 1947), *cert. denied*, 331 U. S. 858; *United States v. Waller*, *supra*. Hence, no constitutional right is violated if an officer, F. B. I. agent or otherwise, goes to an individual, asks, and is granted permission to enter his home. *In re Fried*, *supra*; *Poetter v. United States*, 31 F. 2d 438 (9th Cir. 1929); *Schutte v. United States*, 21 F. 2d 830 (6th Cir. 1927); *United States v. Haas*, 106 F. Supp. 295 (W. D. Pa. 1952). That an officer has a duty to investigate cannot be denied. *Jennings v. United States*, D. C. Cir. No. 13,629, May 29, 1957. This duty includes the right to approach, con-

front and interrogate. *Ellison v. United States*, 93 U. S. App. D. C. 1, 206 F. 2d 476 (1953); *Fisher v. United States*, 92 U. S. App. D. C. 247, 205 F. 2d 702 (1953). Certainly if such a duty and its correlative rights pertain to a suspect at his home, *Jennings* and *Ellison*, or at his business, *Fisher*, they indeed pertain to one who like appellant's wife was not a suspect when the F. B. I. agent interrogated her about the "personal things" of Accardo—appellant's co-defendant who was arrested as a fugitive from justice and who had informed the agent that he had been "visiting friends" at appellant's apartment.

It is well established that the burden of proof on the issue of the illegality of a search and seizure is on the person asserting the contrary. *Nardone v. United States*, 308 U. S. 338, 341 (1939); *Wilson v. United States*, 218 F. 2d 754 (10th Cir. 1955); *White v. United States*, 194 F. 2d 215, 219 (5th Cir. 1952), *cert. denied*, 343 U. S. 930; *Jarabo v. United States*, 158 F. 2d 509, 513 (1st Cir. 1946); *Lotto v. United States*, 157 F. 2d 623, 626 (8th Cir. 1946). Similarly, this Court has held that a defendant has the burden of proving that a confession was illegally obtained. *Tillotson v. United States*, 97 U. S. App. D. C. 402, 231 F. 2d 736, 739 (1956), *cert. denied*, 351 U. S. 989. The premise for this rule is that officers of the Government are presumed to act lawfully. *United States v. Warrington*, 17 F. R. D. 25, 29 (N. D. Cal. 1955); *United States v. Vatune*, 292 Fed. 497 (N. D. Cal. 1923). Moreover, that the burden is on the movant is clear from the expressed language of Rule 41 (e), F. R. Cr. P., which in pertinent part provides:

The judge shall receive evidence on any issue of fact necessary to the decision of the motion.

Notwithstanding his clearly defined burden, appellant remained content on the hearing of his motion to rest solely upon the affidavit of his wife. That this affidavit does not constitute evidence and consequently does not satisfy appellant's burden, as the trial court properly informed appellant, is clear. *United States v. Warrington*, *supra*, best describes appellant's plight:

An affidavit is not evidence, Vendetti v. United States, 9th Cir., 45 F. 2d 543; *Vonherberg v. City of*

Seattle, D. C., 20 F. 2d 247; *Automobile Sales Co. v. Bowles*, D. C. 58 F. Supp. 469, and *McClure v. United States*, 48 F. Supp. 531, 98 Ct. Cl. 381, and it may not be used as evidence in this proceeding to satisfy the mandate that the Court "receive evidence on any issue of fact." The defendant is, therefore, obliged to support his motion by competent legal evidence produced, or adduced, in Court at the time of the hearing. If the rule were otherwise, the clear meaning of the mandate in Rule 41 would be nullified.

The quantum of appellant's burden is clearly defined in *White v. United States*, *supra*:

In order to prevail on this motion, appellants were obligated to show in a *clear and definite way* that the evidence they seek to suppress was obtained in violation of their constitutional rights (*italics supplied*).

It is therefore clear, in the absence of stipulated facts, an issue of fact existed. Since appellant depended solely upon the non-evidentiary affidavit of his wife to rebut the legality of the search and seizure, and failed to "support his motion by competent legal evidence," he has not sustained his burden. *United States v. Warrington*, *supra*; *Tillotson v. United States*, *supra*; *Wilson v. United States*, *supra*; *White v. United States*, *supra*; *Jarabo v. United States*, *supra*; *Lotto v. United States*, *supra*. Appellant does not and cannot contend there was any evidence "produced, or adduced, in Court at the time of the hearing." Thus, the trial court properly denied appellant's motion as to the alleged F. B. I. search and seizure.

Moreover, it is apparent that appellant has no standing to suppress the property acquired by the F. B. I. agent since he has not claimed ownership of the incriminating property and the affidavit of his wife, who in any event was not a defendant, is not capable of bringing appellant within the personal protection of the Fourth Amendment. Only the "person aggrieved," or in other terminology the "victim" of the unconstitutional infringement can question the validity of an alleged illegal search and seizure. *Accardo v. United States*, D. C. Cir. No. 13,596, May 29, 1957.

Neither *Lee v. United States*,⁵ *Waldron v. United States*,⁶ *Higgins v. United States*,⁷ nor *Judd v. United States*,⁸ relied upon by appellant, are contrary to appellee's position, for in each, the defendants not only carried their burden by direct testimony "produced, or adduced in Court," but also effected standing through the same procedure. It is clear from the foregoing the Government's burden to prove actual consent to search does not arise until appellant has first proved *standing* without equivocation and assumed his burden of proving that the Government's evidence is "tainted." *Nardone v. United States, supra*; *Tillotson v. United States, supra*; *United States v. Warrington, supra*.

Assuming, *arguendo*, that the testimony of the F. B. I. agent at appellant's trial, including cross-examination, could be retrospectively applied to appellant's motion, the agent's testimony reflects that Mrs. Rigby's consent was uncolored by "duress or coercion, actual or implied,"⁹ or "submission to authority,"¹⁰ as contended by appellant. For at trial, the agent's testimony revealed no more than that he knocked on the door, conversed with Mrs. Rigby and was admitted (R. 72) and as a result of his conversation (R. 75) seized certain property (not claimed by appellant) some of which, in addition to Accardo's "personal things," proved to have been property stolen in the Lewis housebreaking (R. 68-70), (J. A. 17-18). It is significant, that at the time of this seizure the F. B. I. agents had no knowledge of the housebreakings and larcenies for which appellant and his co-defendant subsequently were indicted and convicted (R. 75, 78-79). However, that Mrs. Rigby, appellant's wife, can and did under these circumstances, voluntarily consent to a search and seizure within premises over which she had joint control or occupancy is clear. *Stein*

⁵ 98 U. S. App. D. C. 97, 232 F. 2d 354 (1956).

⁶ 95 U. S. App. D. C. 66, 219 F. 2d 37 (1955).

⁷ 93 U. S. App. D. C. 340, 209 F. 2d 819 (1954).

⁸ 89 U. S. App. D. C. 64, 190 F. 2d 649 (1951).

⁹ *Amos v. United States*, 255 U. S. 313 (1921).

¹⁰ *Johnson v. United States*, 333 U. S. 10 (1948); and *Waldron v. United States, supra*.

v. *United States*, 166 F. 2d 851 (9th Cir. 1948), *cert. denied*, 334 U. S. 844; *United States v. Sergio*, 21 F. Supp. 553 (E. D. N. Y. 1937). See also *United States v. Sferas*, *supra*, and *In re Fried*, *supra*.

Thus, in any event, the trial court properly denied appellant's motion as to the acquisition of property by the F. B. I. agent.

II

The alleged seizure by the Metropolitan Police was lawful

In substance appellant contends, contrary to the trial court's finding, that Metropolitan Police searched his apartment on June 28, 1956 without his actual consent and arrested him *after* having discovered stolen property.

Although appellant denies the validity of his arrest on appeal, his judicial admission contained in his pre-trial affidavit is to the contrary. In any event, when appellant's liberty was restrained in the hallway just outside his apartment after he had turned on the officers in a menacing manner, appellant was under arrest, as the trial court properly found. *Morton v. United States*, 79 U. S. App. D. C. 329, 147 F. 2d 28 (1945), *cert. denied*, 324 U. S. 875. *Long v. Ansell*, 63 App. D. C. 68, 69 F. 2d 386 (1934).¹¹ Since appellant's wife opened her door at the time of arrest, it was the duty of the police to continue their investigation within the apartment since there was no objection, but especially for their own personal protection.

In addition to the previous grounds mentioned, the Metropolitan Police had reasonable grounds to believe that appellant and his wife had committed a felony—if not grand larceny or housebreaking, at least receiving stolen property. *McQuaid v. United States*, 91 U. S. App. D. C. 229, 198 F. 2d 987 (1952), *cert. denied*, 344 U. S. 929. Adding to the reliable information the officers received from the F. B. I.—that stolen property had been recovered at appellant's apartment, on a previous day—the circumstances of appellant and his wife refusing to answer the officer's knock on their door and appellant's conduct after he came into the hall are sufficient facts to warrant

¹¹ Hence, the officer's testimony that he arrested appellant after obtaining stolen property is not controlling.

a reasonable belief that appellant had committed a felony. That being so, the seizure was lawful as in *Cradle v. United States*,¹² where the defendant was arrested for housebreaking and grand larceny as he came "out of the door" of his mother's apartment, wherein the stolen property was subsequently recovered. Also similar to *Cradle*, "there was no search," for the property seized, not claimed by appellant, was pointed out by appellant and his wife prior to the officer's search (J. A. 34).

In either event, appellant's arrest was valid, and assuming there was a search it was incident to appellant's arrest and with actual consent as shown more fully hereinafter.

(a) Appellant and his wife gave actual consent to the search of their apartment

It is clear from Argument I that the Metropolitan Police, as did the F. B. I., had a duty to investigate and interrogate at the apartment of appellant *Jennings v. United States, supra*; *Ellison v. United States, supra* and *Fisher v. United States, supra*. Indeed, investigation was their expressed purpose (J. A. 36). That appellant's conduct necessitated his arrest after he came out of his apartment did not abrogate the officer's duty to continue their investigation. Nor does a consent to search subsequent to his arrest vitiate actual consent. *United States v. Mitchell*, 322 U. S. 65 (1944); *Brainard v. United States*, 95 U. S. App. D. C. 121, 220 F. 2d 384 (1955). Moreover, if the victim of an *illegal arrest* can make a valid confession as to another crime¹³ and give actual consent to search, appellant under a *valid arrest* can give his actual consent.

That appellant's consent was voluntary is indicated by several facts: 1) the lack of an objection when the officers entered the apartment with appellant after his arrest; 2) appellant's failure to object at his wife giving the officers property allegedly owned by Accardo; and 3) most significant, appellant's cooperation in giving the officer's property allegedly brought to the apartment by Accardo, which his wife had not pointed out (J. A. 33-34).

¹² 85 U. S. App. D. C. 315, 178 F. 2d 962 (1949), *cert. denied*, 339 U. S. 929.

¹³ *Gibson v. United States*, 80 U. S. App. D. C. 81, 149 F. 2d 381 (1945), *cert. denied*, 326 U. S. 724 (1945).

Judd v. United States, *Higgins v. United States*, *Lee v. United States*, and *Johnson v. United States*, *supra*, are clearly distinguishable from the instant case on their facts. And as this Court recently reiterated in *Jennings v. United States*, *supra*, this case must be decided "on its own specific facts."

In *Judd*, the record reflects that the officers themselves were not convinced that the defendant who was incarcerated and not present had given "actual consent" to the search, whereas in the instant case, appellant was present and assisted the officers in recovering property. In *Higgins*, the defendant did not possess "ignorance that contraband [was] present," whereas in the instant case appellant did not necessarily know that the property appellant allegedly brought to his house was stolen. In *Lee*, as in *Johnson*, the arrest was not consummated until the search proved fruitful, whereas in the instant case, as in *Mitchell* and *Brainard*, *supra*, appellant was arrested before the property was recovered.

Moreover, unlike either of the cases relied upon by appellant, all of the property recovered was voluntarily relinquished by appellant and his wife.¹⁴ This element alone would seem sufficient to satisfy the "extraordinary circumstance" requirement of *Higgins*, in order to show actual consent. However, the example, contained in *Higgins*, "such as ignorance that contraband is present" is present herein. For neither appellant's affidavits nor the evidence reflect appellant or his wife had knowledge that the items recovered by the police and allegedly brought there by Accardo were stolen property.

From the foregoing it is clear that no search transpired in the true sense of the term and the seizure was consented to by appellant.

(b) Appellant's wife alone consented to the alleged search

Mrs. Rigby had been cooperative with a Special Agent of the Federal Bureau of Investigation on June 27, 1956, and there was no reason to suspect she would be otherwise on the 28th of June. Having joint occupancy or control over the apartment, she can give actual consent to the search of her premises in appellant's presence, as she did in his absence.

¹⁴ Cf. *Cradle v. United States*, *supra*.

Stein v. United States, 166 F. 2d 851 (9th Cir. 1948), *cert. denied*, 334 U. S. 844. As previously shown by the *uncontroverted evidence*,¹⁵ appellant's wife was indeed cooperative. She gave the police a majority of the property and appellant informed as to a "small television" (J. A. 34).

In any event, whether from the standpoint of a search being absent; or a search incident to arrest, or actual consent to search following appellant's arrest, appellant's rights under the Fourth Amendment were not violated. Hence, the trial court properly denied his motion to suppress the evidence acquired by the Metropolitan Police.

III

Appellant was given concurrent sentences and the evidence is sufficient to sustain count four of the indictment

Assuming, *arguendo*, that appellant's rights were violated by the Metropolitan Police on June 28, 1956, it is clear that appellant has not sustained his burden of proving that the Government's evidence acquired by a Special Agent of the Federal Bureau of Investigation on June 27, 1956, and introduced to sustain Count Four of the indictment is "tainted." Appellant likewise failed on the hearing of his motion to prove standing (Argument I, *supra*). Concurrent sentences having been imposed by the trial court, this Court will not reverse. *Hirabayashi v. United States*, 320 U. S. 81, 85 (1943); *Accardo v. United States*, *supra*; *Gibson v. United States*, *supra*.

CONCLUSION

Wherefore, it is respectfully requested that the judgment of conviction be affirmed.

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
JOEL D. BLACKWELL,
HARRY T. ALEXANDER,
Assistant United States Attorneys.

¹⁵ Contrary to the law, Argument I, *supra*, appellant again erroneously assumes that his affidavit and that of his wife are evidentiary.